United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2062

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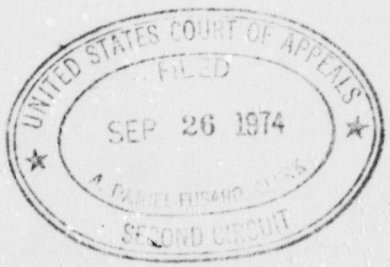
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

INTERSTATE COMMERCE COMMISSION, Plaintiff-Appellee, and ETHAN ALLEN, INC., VERMONT PUBLIC SERVICE BOARD and NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, Intervenors vs. MAINE CENTRAL RAILROAD COMPANY Defendant-Appellant.	)	No. 74-2062

On Appeal From The United States District Court
For The District of Vermont

BRIEF FOR APPELLEE INTERSTATE COMMERCE COMMISSION



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September 20, 1974

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BRIEF FOR APPELLEE

The opinion of the United States District Court for the District of Vermont, Coffrin, J., rendered July 18, 1974, granting appellee's motion for an injunction in the above encaptioned matter, and constituting the basis for this appeal, is appended to this brief. There has been no publication of the Opinion and Order rendered by the United States District Court for the District of Vermont, dated July 18, 1974, Civil Action File No. 74-81; citations to this Opinion and Order are denoted "Op. ."

QUESTIONS PRESENTED

1. Whether the Maine Central Railroad abandoned a portion of its trackage running from North Stratford, New Hampshire to Beecher Falls, Vermont, a distance of 22.96 miles.

2. Whether such abandonment was in violation of sections 1(18) and 1(20) of the Interstate Commerce Act, 49 U.S.C. §§ 1(18) and 1(20).

3. Whether the court below properly issued an injunction in this matter.

STATUTE INVOLVED

Title 49 U.S.C., Section 1(18)

> (18) After ninety days after this paragraph takes effect, no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Title 49 U.S.C., Section 1(20)

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

STATEMENT OF THE CASE

Because of damage incurred by heavy rains between June 29 and July 3, 1973, to bridges and culverts at five locations along the Appellant's Beecher Falls Branch Line between North Stratford, New Hampshire and Beecher Falls, Vermont, an embargo was issued by Appellant on July 3, 1973, amended July 13, 1973. This embargo has been in effect for some 14

months, with no repairs being made to the embargoed line of rail until the most recent weeks. The repairs presently being made are being done pursuant to the Opinion and Order rendered below in this matter by District Judge Coffrin (Op. 14).

The Appellant had no intention of lifting the embargo affecting this segment of track until the Interstate Commerce Commission (I.C.C.) acted on its abandonment petition filed July 19, 1973; some 17 days after the heavy rains (TR. 197).[1]

The board of directors of the railroad had actually voted on June 27, 1973, two days before the heavy rains, to file an abandonment petition with the I.C.C. to abandon service on the subject line of trackage along with other portions of their connecting railroad lines (TR. 173-174). In line with this decision, the appellant's engineering department on July 29,1973 the date of the first rains, ordered all extra men and machinery assigned to the maintenance of the subject line to be assigned elsewhere (TR 276). Previous to the aforementioned filing of the abandonment petition and the rains, the chief engineer of the railroad was contemplating, on July 12, 1973, severing, with payment, the three section men assigned to the subject line; one having been severed to date (TR. 271-272).

The carrier's management had been considering filing for abandonment previous to the washouts, and indeed had been

1. Citations to the transcript of the hearing before the district court are denoted in the form "Tr."

constantly reviewing the subject branch line with an eye towards abandonment for many years (TR. 173), specifically since 1943 (TR. 188).

Ethan Aller Inc., the major shipper located on the abandoned trackage, has received no service on this line since the embargo. Prior to the embargo, service by the railroad to Ethan Allen had been excellent (TR. 79), and the trackage in good condition (Op. 6). Ethan Allen, in tailoring its shipping patterns to the Appellant's rail service, constructed in the mid 1960's some 700 feet of rail line and a 450-foot three-story covered loading shed to handle the freight cars at its own expense (TR. 72-73). During 1971 Ethan Allen shipped out and received 665 cars; during 1972 791 cars, and during 1973 it was projected that they would ship 900 cars (TR. 78). Therefore, Ethan Allen's shipments increased over the last three years at a steady rate.

Because of the railroad's cessation of service, Ethan Allen has been forced to substitute motor carrier service at an additional expense of $193,000 (TR 70). The Ethan Allen Beecher Falls plant presently employs 640 people, after a period of expansion starting in 1968 (TR. 70). With the loss of rail service this plant will no longer be able to expand its production and employment (TR. 77). Ethan Allen has suffered substantial injury by Appellant's illegal abandonment.

The railroad is neither financially nor physically incapable of repairing the damage done to the subject line of track by the heavy rains; the carrier has realized a profit in the past several years; the expense of the subject repairs is about $52,000 with Ethan Allen offering financial assistance in this amount (Op. 7).

I.C.C. was first notified of the abandonment in December of 1973, and processed with dispatch the necessary follow-up investigations, interviews, and finding of facts. The Commission's complaint was promptly filed three months later in the United States District Court for the District of Vermont on March 7, 1974.

Contrary to Appellant's claim, the I.C.C. could not, under the circumstances of this case, annul the embargo for the following reasons.

The Association of American Railroads (AAR) pursuant to Circular CSD -87 fifth revision has the authority to publish embargoes, as an agent, for all carrier members. The AAR did so in the instant case at the request of the Maine Central Railroad. The I.C.C. under the authority granted to it in section 1(11) of the Interstate Commerce Act (49 USC 1(11)) could demand that the railroad cancel the embargo, but such a demand would be pointless if the carrier, as in the case here, refused to repair the line of track. A lifting of an embargo under the above circumstances would only lead to

railroad cars being routed by shippers and carriers over a portion of track upon which it would be impossible to transport them. The I.C.C.'s only practical recourse in this situation is to file for an injunction pursuant to section 1(20) of the Interstate Commerce Act (49 U.S.C. 1(20)), requesting that the subject trackage be repaired so that service could be restored and the embargo lifted.

A delay was caused in the handling of all abandonment petitions by I.C.C. until the matters being contested in Harlem Valley Transportation Association v. Stafford, 369 F. Supp. 1057 (S.D.N.Y. 1973), aff'd at _____ F. 2d _____ No. 73-2496 (2d Cir. June 18, 1974) were resolved. Pursuant to the decision rendered in that case the I.C.C. is currently processing all abandonment applications and preparing threshold impact statements. The subject abandonment has been given priority among the 300 some currently pending before the I.C.C., and a threshold environmental impact statement has been prepared stating that no great environmental impact will be occasioned by the abandonment. The Commission has processed in 1974 to finality some 43 abandonment applications. At this point, there can be no presumption that I.C.C. after hearing all the evidence in this matter will grant a certificate of abandonment.

SUMMARY OF ARGUMENT

Introduction

The effect of the District Court decision in this case is to uphold the remedy provided by section 1(20). In prohibiting

abandonment "...until and unless there shall first have been obtained from the Commission a certificate....," section 1(18) is obviously intended to preserve rail service pending the Commission decision on the merits of the abandonment petition. Such decision is made only after the shippers are given the opportunity to present their case for continued service at a hearing before the agency. It could not be more clear, therefore, that Congress, in balancing the interests of carriers and shippers, conferred on the shippers the right to service pending an I.C.C. decision. Concomitantly in the very same section and paragraph, the legislature granted the railroads the license to operate as a monopoly, providing that no construction of a line of railroad may be undertaken without I.C.C. approval. Thus, the railroads are given the right to be heard in opposition to their potential competition before the construction may begin. In exchange for this benefit, the railroads are burdened with the obligation to render continuous service to all their patrons until the I.C.C. hears the shippers in opposition to abandonment.

The injunction provision of Section 1(20) is one of the factors in the carefully wrought balance of interests embodied in the Interstate Commerce Act. It is the only protection afforded the shipping public against an arbitrary and self-serving abandonment. It is the only assurance of continuous service pending the shippers' opportunity for a hearing in the proper forum. The District Court's ruling has preserved

the balance of benefits and burdens established by Congress. Judge Coffrin ruled that pending the I.C.C. decision the shippers shall be availed of service as the equities and the law demand. Such a ruling is so fundamental to maintaining the integrity of the statute that it must be allowed to stand.

I THE MAINE CENTRAL'S EMBARGO CONSTITUTES AN ILLEGAL ABANDONMENT

As noted by the district court at pages 11 and 12 of its opinion, an embargo of long standing, with no attempts to repair damage, will constitute an abandonment. The Court stated:

> "In Zirn v. Hanover Bank, 215 F. 2d 63 (2d Cir. (1954) the court indicated that abandonment included the concept of a permanent cessation of service. This pronouncement was amplified in Meyers v. Jay Street Connecting R.R., 259 F. 2d 532 (2d Cir. 1958) where the court ruled that an indefinite suspension was conceptually indistinguishable from a permanent discontinuation of service. In Meyers, the court affirmed a ruling that an embargo which had been in effect for only two months was an expression of an intention to indefinitely cease all service and was therefore an abandonment within the meaning of 49 U.S. C. §1(20). Similarly, in Commonwealth of Pennsylvania v. Penn Central Transportation Co., 348 F. Supp. 28, 30 (M.D. Pa. 1972), the court held that an indefinite suspension of operations of a branch line due to severe flooding coupled with a subsequent abandonment application to the I.C.C. covering the trackage in question constituted an abandonment of operations within the meaning of 49 U.S.C. §§ 1(20). In Penn Central, supra, the railroad ceased operations on two branch lines due to flooding in late June 1972 and on September 1, 1972, while operations were still shut down, filed a petition to abandon that trackage with the ICC. In an opinion filed on September 18, 1972, the court concluded that this hiatus of less than three months constituted an indefinite suspension of operations constituting an abandonment."

The management of the Maine Central Railroad had indefinitely suspended operations of the subject line of trackage, for they had no intention to resume service unless the application to the I.C.C. was denied or the district court ordered them to resume service. Such an indefinite suspension of service constitutes an abandonment within the meaning of section 1(20) of the Interstate Commerce Act.

There is no such thing as a "conditional suspension of service" as mentioned by Appellant at page 14 of its brief. C.F. Meyers v. Jay Street Connecting R.R., supra. There is no time-honored practice of indefinitely embargoing lines of railroad. As stated in New Orleans Traf. & Trans. Bureau v. Miss. Valley Barge 280 ICC 105, 117.

> "An embargo is an extraordinary remedy for the purpose of relieving a transportation disability. It can be changed or modified, and should be a temporary measure which leaves the rate structure undisturbed." (emphasis supplied)

There is nothing temporary about the railroad's cessation of service in this case. The carrier determined no transportation would be provided over this line for an indeterminate length of time, and that no repairs would be made to alleviate the cause of the embargo.

The fact that heavy rains caused the damage to the track is no defense to an illegal abandonment. As long as the carrier is not incapable, either physically or financially to repair the damage caused by acts of God, it must do so within a reasonable length of time. (Op. 13). Such reasoning does no violence to

the decision in Myers v. Arkansas & Ozarks Ry. Corp., 185 F. Supp. (W.D. Ark. 1960) where the carrier could not make the necessary repairs as it had no title to the damaged property, or to Asbury v. Chesapeake & Ohio Ry. Co., 264 F. Supp. 437 (D.D.c. 1967) where large amounts of money would need be expended to overcome the damage.

II THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT APPLY TO THE ENJOINING OF AN UNLAWFUL ABANDONMENT, WHICH IS A PURE QUESTION OF LAW UNDER FEDERAL STATUTE.

The above principle has been closely analyzed and affirmed as recently as July 24, 1974 when the Eighth Circuit Court of Appeals rendered its decision in ICC v. Chicago, Rock Island & Pacific R. Co., No. 73-1920 (8 Cir., July 24, 1974), (Copy attached). At page 9 of its decision the court held:

> "...We emphasize that the question before the District Court does not concern the merits of the abandonment application--this is a matter for the ICC-but merely the narrow issue of whether an abandonment has occurred. Once this question is resolved with a finding of abandonment, the District Court then must proceed to determine whether an injunction should issue."

Further in ICC v. St. Johnsbury & L.C. Railroad, Civil Action No. 73-3 (D. Ver., decided January 31, 1973), the Court held that the carrier's challenge to the Court's jurisdiction was without merit. The Court went on to state:

> "...this court has jurisdiction of cases arising under the laws of the United States. The Interstate Commerce Act prohibits the unauthorized abandonment of operations by a regulated railroad 49 U.S.C. Sec. 1(18). The Act confers authority on this court at the suit of the Commission.... Powell v. United States, 300 U.S. 276,287 (1936); I.C.C. v. Memphis Union Station Company et al., 360 F. 2d 44 (6th Cir. 1966), cert. denied 385 U.S. 830.

A reading of these two opinions compels the conclusion that the challenge of primary jurisdiction has no basis in the present case.

III THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE DISTRICT COURT IN THE BALANCING OF THE EQUITIES

The district court in its opinion in this matter addressed itself to all equitable considerations raised by the railroad's abandonment. The court summed up the equitable considerations at page 13 of its opinion where it stated:

> "...a major shipper, Ethan Allen, Inc. has heavily relied on the continuation of rail service in establishing its operational scheme and the Company has offered to assist the Railroad in restoring service. The interruption of rail service has had a serious impact on Ethan Allen and has created a hardship for it sufficient to grant injunctive relief. Furthermore, we perceive that it may well be contrary to public convenience and necessity to permit the unilateral termination of the Beecher Falls branch by the Railroad. Finally, the defendant has advanced no compelling reasons why service should not be restored. It has the present financial ability to make the repairs and the impact thereof is ameliorated by Ethan Allen's offer of economic assistance. Furthermore, the possibility that the abandonment application will be favorably acted on by the Commission on the facts of this case is

> not a consideration of such compelling force to sanction the Railroad's improper abandonment of the Beecher Falls line.
>
> "In light of the above factors, we conclude that an injunction should issue and we hereby order the Railroad to immediately proceed to restore rail service to the Beecher Falls branch so that service may as reasonably as possible approximate the service provided just prior to June 29, 1973."

The "carrier's equities" rationale on which the Asbury, supra, case rests and on which the Arkansas and Ozarks leans, is discredited by the decisions in Meyers v. Jay Street Connecting R.R., 259 F. 2d 532 (2d Cir. 1958), and Meyers v. Jay Street Connecting R.R., 288 F. 2d 356 (2d Cir. 1961), in which the Second Circuit Court adhered more closely to the statute as written than did the Asbury and Arkansas and Ozarks District Courts.

In the first Jay Street case, the grant of a preliminary injunction was affirmed, despite the facts that: (1) a petition for abandonment had been filed two months before the action for injunction, (2) an I.C.C., hearing was scheduled within two weeks of the argument before the Second Circuit, (3) the carrier's financial difficulties which prevented the operation of the railroad were caused in part by accidental injury to its equipment, and (4) the costs of restoration of service would have involved well over a million dollars.

In the latter Jay Street case, the appeal from the grant of the permanent injunction, the court affirmed despite the

fact that the operation of the railroad had been carried on at a loss for the preceding five years, the deficit operation having been made possible by contributions from the personal funds of the shareholders. The court recognized that continued operations could not be accomplished without further such contributions, but observed that the remedy for this kind of difficulty is Section 77 of the Bankruptcy Act, under which financially embarrassed railroads may operate in receivership.

The Jay Street cases, from the Second Circuit, are not only higher judicial authority on this question, but are clearly the better reasoned decisions, than the District Court decisions. They recognize the statutory scheme, by which the carriers may protect themselves from losses on an unprofitable line - through the Bankruptcy procedure or, earlier through the procedure of orderly abandonment via petition to the I.C.C.

It is interesting to note that the petition to abandon the Jay Street line was granted by the I.C.C. in 307 I.C.C. 137 (1959). The court apparently resisted the temptation to tailor its decision to a possible result before the Commission, as the District Courts appear to have done.

It is obvious from the Jay Street cases and the clear wording of this Act, that the strictures of Section 1(18) and 1(20) apply equally to solvent, as is the case at bar, and insolvent railroads. Smith v. Hoboken R.R. Warehouse & S.S. Connecting Co., 328 U.S. 123 (1946).

The Meyers v. Jay Street court said:

> "The railroad's books had shown it to be operating at a loss for five years prior to the unjustified abandonment attempt in August of 1958. Despite this, the (railroad) appellants had made no attempt to obtain a rate increase, or to get permission from the Commission to abandon their apparently unprofitable line. As we pointed out in Meyers v. Jay Street Connecting Railroad, 2 Cir., 1958, 259 F. 2d 532, at page 536, they could have sought to escape personal liability by petitioning for reorganization under 77 of the Bankruptcy Act, 11 U.S.C.A. 205. This case is quite different from one where there is no way to escape personal liability, or where operation of railroad suddenly - because of a catastrophe - becomes impossible without contribution from the owners.
> Under the circumstances of this case the hardship imposed was fully justified in view of the public interest in not permitting abandonment of railroad service without approval of the ICC as required by the Interstate Commerce Act."
>
> Meyers v. Jay Street Connecting R.R., 288 F. 2d 356, 361 (2d Cir. 1961).

It is therefore not compelling in this case that the railroad may be forced to expend monies to repair its line of rail although such evidence might be properly introduced in an I.C.C. hearing on the merits of the abandonment petition. It would be a farce to interpret Section 1(18) so as to give the shippers their right to the I.C.C. hearing only as against a very affluent railroad. Plainly this is error which prejudices not only the shippers on a line such as the Beecher Falls Branch line, but shippers on all marginally profitable lines. Such a statement of law will encourage

the railroads to summarily abandon their lines and then argue that the law does not apply to them because of financial considerations alone.

Section 1(18) protects the shippers on the lines of all railroads equally. The "equities" of the railroads are protected by their opportunity to abandon by the orderly, prescribed process of application to the I.C.C.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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Attachments

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief and attachments upon all parties by mailing copies thereof to all attorneys of record.

Dated at Washington, D.C. this 20th day of September, 1974.

John J. Mahoney, Jr.
Attorney
Interstate Commerce Commission

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Interstate Commerce Commission	:	
and	:	
Ethan Allen, Inc., Vermont Public Service Board and New Hampshire Public Utilities Commission, Intervenors	:	Civil Action File No. 74-81
v.	:	
Maine Central Railroad Company and E. Spencer Miller	:	

OPINION AND ORDER

I. Procedural Background and Findings of Fact

This civil action, commenced by the Interstate Commerce Commission on March 20, 1974, seeks injunctive relief against the defendant, Maine Central Railroad Company, [1] restraining it from alleged illegal abandonment of a certain segment of its track in the States of New Hampshire and Vermont. Shortly after the commencement of this action, the Public Service Board of the State of Vermont, Ethan Allen, Inc., and the Public Utilities Commission of the State of New Hampshire moved to intervene in this action, which motions were granted. From the hearings held on this matter on May 21, May 22 and June 7, 1974, the following facts appear.

The Maine Central Railroad Company (Maine Central), one of the relatively few financially solvent railroads in the Northeastern United States, is a carrier subject to the Interstate Commerce Act, 49 U.S.C. § 1, et seq. Through outright ownership and trackage agreements with the Boston

and Maine and Canadian National Railway, it operates a 57.52 mile rail line from Quebec Junction in Carroll, New Hampshire, to Beecher Falls, Vermont. This line has been divided by the Maine Central into four segments, the fourth segment being the so-called Beecher Falls branch, a 22.96 mile dead-end stretch owned by the Maine Central which runs from North Stratford, New Hampshire, to Beecher Falls, Vermont. All but approximately 1.5 miles of the track is located in New Hampshire with the remaining one and one-half mile segment located in Vermont.

Prior to June 30, 1973, the Railroad's principal customers on the Beecher Falls branch were Ethan Allen, Inc., a furniture manufacturer, and the Woodland Division of the St. Regis Paper Company, a pulpwood processor. On June 30, 1973, the St. Regis Company discontinued operations at its Beecher Falls facility. St. Regis' carloadings for the year 1971 and 1972 accounted for between 20 and 21 percent of the total carloadings on the line. In the first quarter of 1973, the carloadings attributable to St. Regis were 38 percent of the total carloadings on the branch. However, this increased traffic was related to the termination of St. Regis' operations.

On June 29, 30 and July 1, 1973, heavy rains and concomitant flooding occurred in New Hampshire and Vermont which caused damage to segments of the Maine Central's trackage on tne Beecher Falls branch from North Stratford, New Hampshire, to Beecher Falls, Vermont. Most of the damaged track was located in the State of New Hampshire. As a result of the flood damage, on July 3, 1973 the Maine

Central published a so-called embargo notice in the Association of American Railroads daily communications newsletter, ceasing all rail service on the Beecher Falls branch from North Stratford, New Hampshire, to Beecher Falls, Vermont. The stated reason for the embargo was "damage to track structure from High Water." In the railroad industry an embargo notice is the customary manner of ceasing rail service due to labor problems, traffic congestion, unforeseen physical damage to track or equipment or other similar phenomena which make continued rail service over the described trackage impossible.[2] Prior ICC approval to file an embargo notice is not required.[3]

The embargo notice filed by the Maine Central on July 3, 1973 was modified in minor detail on July 13, 1973 but it has not been lifted or significantly altered since its issuance on July 3, 1973. Neither has the damage caused by the flood been repaired. Consequently, no rail service has been provided on the branch from North Stratford, New Hampshire, to Beecher Falls, Vermont, since before the flooding of late June and early July, 1973.

Prior to the flood the Maine Central had under active consideration an abandonment of the entire 57.52 mile segment of track from Quebec Junction to Beecher Falls. The St. Regis Paper Company had notified the Railroad in the early part of 1973 of its decision to terminate its operations in Beecher Falls effective the end of June, 1973. This fact, plus the pre-existing business and profitability of the entire line which the Railroad's President, E. Spencer Miller, described as "marginal and of light density" precipitated

consideration of abandonment. On June 27, 1973, Miller made a report emphasizing these facts to the Maine Central's Board of Directors of which he is the Chairman and the Board voted to take the necessary steps to secure approval from the ICC to abandon the entire 57.52 mile line. Miller testified that it was the Maine Central's intent on June 27, 1973 to continue to operate this line until the matter of abandonment was resolved by the ICC.

On July 19, 1973 the Railroad completed its "long form" petition to abandon the entire line and filed it with the ICC which received it on July 24, 1973. No official action has been taken by the Commission on this Petition to Abandon and with the exception of several telephone conversations and an informal conference between officials of the Maine Central and the ICC, there has been no communication between the Railroad and the Commission on the application. Counsel for the Commission represented that although abandonment petitions are usually decided by the Commission within six months of their filing date, the decision in Harlem Valley Transportation Association v. Stafford, 360 F. Supp. 1057 (S.D.N.Y. 1973), requiring an environmental impact statement under the National Environmental Policy Act, 42 U.S.C. §§ 4321-47, to be prepared by the Commission as a condition precedent to approving an abandonment petition has delayed the Commission's decision in the matter of the Maine Central's Petition. The case which was on appeal to the United States Court of Appeals for the Second Circuit as of the date of the hearing in this matter has subsequently been decided.[4/]

On July 2, 1973, shortly after the floods subsided, the Maine Central's Chief Engineer and its track engineer made an inspection trip over the trackage from North Stratford, New Hampshire, to Beecher Falls, Vermont, for the purpose of determining the extent of the flood damage. They reported on July 3, 1973 that damage had been caused to three bridges and the roadbed in a four mile area beginning approximately three miles from North Stratford, New Hampshire, and ending seven miles from North Stratford toward Beecher Falls. Miscellaneous small washouts totalling approximately 200 yards occurred in Vermont. At this time, it was estimated that it would cost approximately $21,000 to $29,000 and take eight to ten working days to take corrective action, make necessary repairs and restore the New Hampshire trackage on this branch to the condition in which it existed just prior to the flood. This figure did not include an estimated $1,000 of damage to Vermont trackage on the branch. A summary of the damage was included in the abandonment petition filed with the ICC in which the Railroad stated "A preliminary estimate of the expense of repairing damages to this segment of line [the Beecher Falls branch] is $30,000."

The Railroad's Chief Engineer testified that this $30,000 figure included only labor and material and did not take into consideration a surcharge for accounting costs, the use of repair equipment and supervisory personnel. An updated repair figure was made as of January 11, 1974 including the above enumerated items which, in the Railroad's

estimate, increased the cost of restoring the track to its pre-flood condition at $52,000. Neither the $30,000 figure nor the $52,000 figure take into consideration the cost of deferred maintenance on the line nor the cost of normal periodic maintenance.

Both the locomotive engineer and trainman who operated the equipment on this branch line testified that prior to June 30, 1973, the roadbed and track was in good condition and the train was able to negotiate this branch at its posted bulletin speed of approximately 20-25 miles per hour. There was also testimony that in the past ten years of operation there were very few derailments or other mishaps in negotiating this line and those which did occur were due to rails spreading or twisted rails caused by solar heat.

Upon the cessation of business by St. Regis Paper Company, Ethan Allen became the principal and probably only customer on the Beecher Falls branch. Prior to June 30, 1973, the predominant portion of Ethan Allen's transportation requirements were fulfilled by the Maine Central, with only local, short-distance shipments being carried by other means of transportation. There was testimony that whereas it cost Ethan Allen approximately $84,700 in 1972 to ship via the Maine Central, the same traffic by necessity is now transported by truck at a cost of $193,000 which includes additional labor, handling, damage and truck leasing. Furthermore, Ethan Allen's Beecher Falls facility was specifically designed for product shipment by rail. Among its other features, the plant has a 700 foot rail siding installed in 1964 at the Company's own expense and an indoor loading area that can

accomodate nine railroad cars. Because of its dependence on rail transportation, Ethan Allen decided in the latter part of 1973 to offer the Maine Central the sum of $30,000 to restore rail service to the Beecher Falls line. The $30,000 figure was derived from the Railroad's estimate of damages contained in its abandonment application to the ICC. This offer was not directly communicated to the Maine Central, but rather was made to the Deputy Commissioner of the Vermont Public Service Board by Ethan Allen's Attorney who evidently believed this offer was to be relayed to the Railroad by the Deputy Commissioner. Although there appears to be a conflict in the testimony as to whether this offer was actually communicated to the Railroad during the latter part of 1973 or the early part of 1974 in the same terms as it was communicated to the Vermont Public Service Board Deputy Commissioner, suffice it to say that Ethan Allen, Inc. is presently willing to assist the Railroad in repairing the flood damage to the Beecher Falls branch and at the hearing held on this matter increased its offer of assistance to $52,000 which equals the updated repair cost figure established by the Railroad.

Although there was no testimony introduced that the Maine Central has present plans or intention of restoring service on the Beecher Falls line, the record reflects that the Railroad is neither financially nor physically unable to repair the damage caused by the flood and resume operations on the Beecher Falls branch. Indeed, the evidence before the Court indicates that the Railroad has realized a profit in the past several years of operation and has sufficient manpower to effect the necessary repairs.

II. Consideration of Maine Central's Motion to Dismiss

The Railroad contends that this Court should not exercise jurisdiction over this matter on two grounds. First, that the doctrine of primary jurisdiction requires a preliminary resort to the administrative processes of the ICC to determine the legality of the alleged abandonment of the Beecher Falls branch and second, that because the ICC has before it an abandonment petition covering the track included in the Beecher Falls branch, this Court should stay its hand pending the outcome of that administrative proceeding since an order from the ICC allowing abandonment could well render a decision by this Court meaningless and unnecessary.

The difficulty with the defendant's primary jurisdiction argument is that the essential question before us is whether the Maine Central illegally abandoned the trackage on the Beecher Falls branch contrary to the Interstate Commerce Act.

Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18) provides in pertinent part that:

> No carrier by railroad . . . shall abandon all or any portion of a line of railroad or operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment. (emphasis added).

The only mechanism that the Commission has to prevent an unlawful abandonment, i.e. an abandonment before the acquisition of such a certificate, is contained in 49 U.S.C. § 1(20), the jurisdictional predicate for this action. Powell v. United States, 300 U.S. 276, 287 (1937). That section provides in pertinent part that:

> Any . . . abandonment contrary to the provisions of [49 U.S.C. § 1(18)] may be enjoined by any court of competent jurisdiction . . . .

The progenitor of the primary jurisdiction doctrine, Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) indicates that the context of the federal enactment sought to be enforced must be scrutinized before any decision is made as to whether the alleged violation of the Act can be redressed by the courts without previous action by the agency to whose discretion enforcement of the Act is committed. 204 U.S. at 446.

As stated in United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956):

> Primary jurisdiction . . . comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Although under the Interstate Commerce Act legal abandonment matters and the validity of embargoes may be within the special competence of the ICC, we believe the statutory scheme of the Act places illegal abandonments within the special competence of the courts. Any expert or specialized knowledge the ICC may have concerning the transportation industry is not essential where the question is fundamentally whether an abandonment has improperly taken place prior to the issuance of the requisite Certificate of Public Convenience and Necessity provided for in 49 U.S.C. § 1(18) and not whether the abandonment is within the public interest and the policies of the Interstate Commerce Act. See Far East Conference v. United States, 342 U.S. 570, 574-75 (1952). Furthermore, we perceive that in illegal

abandonment matters, the strong policy of "uniformity and consistency in the regulation of the business entrusted to the agency" is not a paramount factor because, as previously indicated, the agency has no authority to terminate illegal abandonments on its own but rather, pursuant to 49 U.S.C. § 1(2), must apply to the courts for relief.[5/] Powell v. United States, 300 U.S. 276, 287 (1937).

In sum, we conclude that the issues before us are not within the parameters of the doctrine of primary jurisdiction. See also ICC v. St. Johnsbury and Lamoille County R.R., Civ. 73-3 (D. Vt. filed January 31, 1973), where Judge Holden rejected as "without merit" the contention of the defendant railroad that the termination of service without an ICC certificate is a matter committed to the administrative jurisdiction of the ICC.

Defendant's second contention is also wide of the mark. A rail carrier has no right to unilaterally abandon rail service pending the administrative adjudication of an abandonment petition. Meyers v. Jay Street Connecting R.R., 259 F.2d 532, 536 (2d Cir. 1958). As the court in Meyers pointed out, there is a "strong purpose" in the Interstate Commerce Act "to prohibit the abandonment of railway service without the approval of the ICC." Id. at 536. Therefore, if the Maine Central's cessation of service from July 3, 1973 up to and including the present time constitutes an illegal abandonment within the meaning of the Act, it should not be heard to complain that the Commission was tardy in its decision on the abandonment petition. The Court is cognizant, however, of the irrationality of any expenditure

of funds for a rail line whose termination may be imminent and the Court does not look with favor upon the delay of the Commission of almost one year for whatever reason in processing an application for abandonment which normally takes approximately six months. We do not believe, however, that these considerations have such weight when viewed in contrast to the strong policy in the Act prohibiting unilateral abandonments that we should decline to remedy conduct on the part of a carrier which may be in violation of the Act.

III. The Propriety of the Maine Central's Termination of Operations on the Beecher Falls Branch

We note at the outset that nowhere in the Interstate Commerce Act is the phrase "abandonment" defined although it is utilized therein with some frequency. See 49 U.S.C. §§ 1(18), (19), (20), (22). Consequently judicial interpretation of the concept of abandonment becomes relevant.

In Zirn v. Hanover Bank, 215 F.2d 63 (2d Cir. 1954) the court indicated that abandonment included the concept of a permanent cessation of service. This pronouncement was amplified in Meyers v. Jay Street Connecting R.R., 259 F.2d 532 (2d Cir. 1958) where the court ruled that an indefinite suspension was conceptually indistinguishable from a permanent discontinuation of service. In Meyers, the court affirmed a ruling that an embargo which had been in effect for only two months was an expression of an intention to indefinitely cease all service and was therefore an abandonment within the meaning of 49 U.S.C. §1(20). Similarly, in Commonwealth of Pennsylvania v.

Penn Central Transportation Co., 348 F. Supp. 28, 30 (M.D. Pa. 1972), the court held that an indefinite suspension of operations of a branch line due to severe flooding coupled with a subsequent abandonment application to the ICC covering the trackage in question constituted an abandonment of operations within the meaning of 49 U.S.C. § 1(20). In Penn Central, supra, the railroad ceased operations on two branch lines due to flooding in late June, 1972 and on September 1, 1972, while operations were still shut down, filed a petition to abandon that trackage with the ICC. In an opinion filed on September 18, 1972, the court concluded that this hiatus of less than three months constituted an indefinite suspension of operations constituting an abandonment.

We believe that the rationale of the above cases is fully applicable to the instant situation where approximately one year has elapsed since the cessation of service. The extremely lengthy period of discontinuation of service in this case, extending well beyond any reasonable time required to repair the flood damage, coupled with the clear financial and physical ability of the Railroad to repair the damage and resume service must, in our view, be construed as an illegal abandonment capable of injunction under 49 U.S.C. § 1(20). In so holding we do no violence to the apparently settled railroad industry practice of embargoing trackage where physical impossibility beyond the reasonable control of the railroad forces rail service to halt. See e.g. Smith v. United States, 211 F. Supp. 66 (D. Conn. 1962); Myers v. Arkansas & Ozarks Ry. Corp., 185

F. Supp. 36 (W.D. Ark. 1960). The implicit recognition in permissible embargo cases is that service will be restored when the impossibility terminates and thus no intent to abandon can be inferred from the cessation. In our view, the converse of that situation exists here since the impossibility created by the June, 1973 flood damage has long since passed and the Railroad makes no serious claim that it is incapable of restoring service on the Beecher Falls branch.

Although the issuance of injunctive relief does not automatically follow from our conclusion that there has been an abandonment inimical to section 1(20), Commonwealth of Pennsylvania v. Penn Central Transp. Co., supra, we believe that in this case restoration of service should be ordered. It is not for this court to decide the relative merits of abandoning the Beecher Falls branch. That task is committed to the ICC which this Court feels should exercise its legislatively mandated duty to pass on the defendant's abandonment application with all practical expediency. However, a major shipper, Ethan Allen, Inc. has heavily relied on the continuation of rail service in establishing its operational scheme and the Company has offered to assist the Railroad in restoring service. The interruption of rail service has had a serious impact on Ethan Allen and has created a hardship for it sufficient to grant injunctive relief. Furthermore, we perceive that it may well be contrary to public convenience and necessity to permit the unilateral termination of the Beecher Falls branch by the Railroad. Finally, the defendant has advanced no compelling reasons why service should not be restored. It has the present financial ability to make the repairs and the impact

thereof is ameliorated by Ethan Allen's offer of economic assistance. Furthermore, the possibility that the abandonment application will be favorably acted on by the Commission on the facts of this case is not a consideration of such compelling force to sanction the Railroad's improper abandonment of the Beecher Falls line.[6/]

In light of the above factors, we conclude that an injunction should issue and we hereby order the Railroad to immediately proceed to restore rail service to the Beecher Falls branch so that service may as reasonably as possible approximate the service provided just prior to June 29, 1973. In this restoration effort, the $52,000 which Ethan Allen has agreed to contribute toward repair of the flood damage shall be applied solely to the cost of repairing damage directly attributable to the flooding as set forth in the Railroad's own damage investigation appearing at page 8 of its abandonment application filed with the ICC. Any additional expenses incurred as the result of the length of time of the discontinuation or any deferred maintenance expenditures which may be necessary are to be borne by the Railroad. Upon completion of repairs, the Railroad shall furnish the Court and all parties with an itemized accounting of its total expenditures for such repairs, specifically denoting therein the amounts expended to repair the flood damage described on page 8 of its application for abandonment. Payment by Ethan Allen to the Railroad for its share of expenditures for said flood repairs shall be ordered by the Court upon the Court's approval of said accounting. No hearing shall be held by the Court on said accounting unless

specifically requested by Ethan Allen by motion filed within ten days of the date of filing of said accounting, in which it denotes the areas of said accounting with which it disagrees and the reasons therefor. In the event that the ICC favorably acts upon the Maine Central's abandonment application before the repair work is finished the obligation to finish the repair work shall terminate and Ethan Allen's obligation to the Railroad for payment for flood damage repairs shall be limited to the cost of such repairs accomplished to the date of termination, assuming at such time the cost does not equal or exceed the sum of $52,000. In the instance of such a termination the Court's instructions with reference to an accounting shall be followed by the Railroad and Ethan Allen. The Court wishes to emphasize that the restoration of service should proceed to completion with all deliberate dispatch and to that end directs that a brief written review of the progress of the repair effort be supplied by the Railroad to the Court every two weeks from the date of this Order.

Dated at Burlington in the District of Vermont, this 18th day of July, 1974.

District Judge

FOOTNOTES

1/ The President of the Penn Central Railroad, E. Spencer Miller, is named as a party defendant. For purposes of this opinion we shall refer to both as the "defendant."

2/ The existence of this industry custom was recognized in New York Central R.R. Co. v. United States, 201 F. Supp. 958 (S.D.N.Y. 1962).

3/ In New York Central R.R. Co. v. United States, supra, the court indicated that the right of carriers to limit their duty to provide transportation by the issuance of embargoes in the time of emergency is settled.

4/ Harlem Valley Transportation Association v. Stafford, ____F.2d____, Docket No. 73-2496 (2d Cir. June 18, 1974). The decision holds, inter alia, that the ICC must take an active role in preparing the environmental impact statement required by Section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, by preparing a draft thereof prior to any public hearings on an abandonment petition so that the Agency's evaluation of environmental issues is available for the public's comments prior to a determination of the abandonment petition and so that such a statement can accompany the petition through the Agency's review process.

5/ The defendant, relying on New York Central R.R. Co. v. United States, supra, contends that the ICC has power to issue an order annulling an embargo on grounds that it is an unreasonable practice within the meaning of Section 1(6) of the Interstate Commerce Act. However, the legality or validity of the embargo itself is not at issue here but rather the underlying cause of the necessity for the embargo which the ICC alleges is an illegal abandonment. As indicated above, we believe that when an illegal abandonment occurs as contrasted with merely an embargo, the doctrine of primary jurisdiction does not foreclose the Commission or any other party enumerated in 49 U.S.C. § 1(20) from exercising his rights to judicial relief. We note in passing that New York Central R.R. Co., supra, was not concerned with a cessation of all service on a line but rather a refusal to accept less than carload shipments because of financial reasons and thus there probably was no basis for proceeding with an abandonment action in that case.

6/ Defendant urges us to adopt the position of the court in Commonwealth of Pennsylvania v. Penn Central Transportation Co., supra, where, although the court found that there had been an abandonment within the meaning of Section 1(20) of the Act, it refused to issue an injunction pending a decision by the ICC on whether to permit abandonment. We find this aspect of the case inapposite to the matter before us since in that case the restoration cost was over $650,000 and the defendant Railroad was a bankrupt. Indeed, the court indicated that as a condition to granting plaintiff the injunction it sought, it would have required the plaintiff to obtain permission to maintain the suit from the court exercising jurisdiction over the bankrupt.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 73-1920

INTERSTATE COMMERCE COMMISSION, Appellant, v. CHICAGO, ROCK ISLAND, AND PACIFIC RAILROAD COMPANY, Appellee.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska

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Submitted: May 14, 1974

Filed: July 24, 1974

Before GIBSON and WEBSTER, Circuit Judges, and WILLIAMS, District Judge*.

GIBSON, Circuit Judge.

This litigation might be considered another chapter in the saga of the vanishing American railroads. Due to an abandonment of approximately 39 miles of track by the Chicago, Rock Island and Pacific Railroad Company (the Rock Island), the residents of Gladstone, Gilead, Hebron, Deshler and Ruskin,

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*The Honorable Paul X Williams, United States District Judge for the Western District of Arkansas, sitting by designation.

ka, no longer have to "stop, look, and listen" before ng the Rock Island's Ruskin line. More importantly in te of the statutory scheme embodied in the Interstate Commerce Act,[1] shippers have been forced to turn to alternate methods of transporting goods due to the abandonment of rail service. However, in this proceeding we are not called upon to determine the merits of the abandonment application pending before the Interstate Commerce Commission (ICC), but rather must determine where the proper means of redress lies for an unauthorized abandonment of lines subject to the jurisdiction of the ICC.

The Congressional scheme is set forth in 49 U.S.C. §1. Section 1(18) provides in pertinent part:

> [N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. (emphasis supplied).

Section 1(20) further provides:

> The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it * * * and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may * * * proceed with the * * * abandonment covered thereby. Any * * * abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of * * * the Commission * * *. (emphasis supplied).

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[1] 49 U.S.C. §1 et seq.

The ICC and the Nebraska Public Service Commission brought suits pursuant to 49 U.S.C. §1(20) for an injunction compelling the Rock Island to restore service on its Ruskin line. After a hearing on the consolidated actions, the District Court refused to enjoin the abandonment; instead it ordered dismissal of the actions. The court felt that the ICC should exercise primary jurisdiction in the matter because its special expertise would allow it to resolve the issues of the effect of abandonment on the Rock Island, the probable cost of restoration of service, the financial ability of the Rock Island to bear the cost of restoration, and what effect the outlay of funds on the Ruskin line would have on service to shippers in other parts of the country--in short, those issues relative to the merits of the Rock Island's abandonment application. The ICC appeals the dismissal of its complaint, arguing that the doctrine of primary jurisdiction does not apply.[2] Before proceeding to the legal issues presented, a detailing of the relevant facts will be helpful in understanding the issues.

The controversy took form March 2, 1973, when the Rock Island issued an "embargo", a notice to patrons on the line that service would be terminated because of poor track conditions. An "embargo" issued by a common carrier is an emergency measure used when for some reason the carrier is unable to perform its duty as a common carrier. Froehling Supply Co. v. United States, 194 F.2d 637, 641 (7th Cir. 1952). If justified, an embargo serves to relieve the carrier of its liability for failing to provide transportation. See 49 U.S.C. §1(4)(Duty to furnish transportaiton); 49 U.S.C. §8(Liability of carriers for damages).

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[2]The Nebraska Public Service Commission did not appeal the dismissal of its suit by the District Court.

Suit by the Nebr[illegible] Public Service Commission [illegible] May 5, 1973, seeking to enjoin "abandonment"; the Rock Island's application for abandonment was filed with the ICC May 21, 1973; and the instant suit was filed August 22, 1973, and consolidated with the prior Public Service Commission action.

The threshold question for the District Court's determination was whether an abandonment had occurred. If the cessation of operations continued because of conditions over which the Rock Island had no control, no abandonment within the meaning of 49 U.S.C. §1(18) would be established. Zirn v. Hanover Bank, 215 F.2d 63, 69 (2d Cir. 1954); Myers v. Arkansas & O. Ry., 195 F.Supp. 36, 41 (W.D.Ark. 1960).

Abandonment, unlike an embargo, implies an intention to indefinitely or permanently cease all service. Meyers v. Jay Street Connecting R.R., 259 F.2d 532, 535 (2d Cir. 1958); Wheeling & L.E. Ry. v. Pittsburg & W.V. Ry., 33 F.2d 390, 392 (6th Cir. 1929). Factually, determination of the question revolves around the intent of the railroad; cessation of service for lack of physical equipment has been determined not to be an abandonment, Zirn v. Hanover Bank, supra, as has the impossibility of operation due to flood damage to tracks and railway bridges, Myers v. Arkansas & O. Ry., supra.

Here there is no difficult question of fact as to whether an abandonment occurred. The District Court determined there was an abandonment in May or June, 1973, when weather conditions would have allowed track restoration. The Rock Island admitted on oral argument that there was a "technical" abandonment in June, 1973. The Rock Island maintains that an unusual winter and spring, marked by abnormal precipitation and temperature fluctuation, caused the softening of the roadbed

and deterioration of ties to the extent it was no longer safe to run a train on this line. This must be considered a matter of degree, as the fact that 50 derailments occurred on this line from February, 1971, through January, 1973, could have led to a conclusion that the line was no longer safe prior to March 2, 1973.

The Commission admits the impossibility of operation over the Ruskin line in March, 1973. However, it asserts that these weather conditions would not have necessitated abandonment of operations had the railroad not consciously withheld essential maintenance from the line over the preceding years. The record shows that the Rock Island had been looking for a way to abandon the line since at least October, 1970. Because it could foresee no success with an abandonment petition before the Commission, it considered itself to be in a dilemna. The Ruskin line has continually shown a profit. The Rock Island felt that cost of performing essential rehabilitation on the line would not be warranted by the revenue it produced. If the Rock Island did rehabilitate the line, it would be able to show an operating loss and thereby improve its chances of having abandonment approved. If it did not rehabilitate the line, it would continue to show a profit, thus decreasing the chances on its abandonment petition. Opting for the short run profit until the Rock Island's management determined the time was auspicious for approval of its planned abandonment application, the matter continued to be much debated from October, 1970, to March, 1973, when the railroad was spared any further debate by the unusual weather conditions which finally put the track out of service.

The Commission's view that the track would not have become impassable in March, 1973, except for the Rock Island's failure to perform essential maintenance finds support in the

record. Minutes of a November 27, 1970, Branch Line Committee meeting indicate that the Ruskin line was even then in "deplorable condition." A memo from W.C. Hoenig, General Manager of the Kansas City, Kansas, operating department to R.J. Lane, Senior Operating Assistant of the Rock Island, dated March 24, 1971, stated: "Almost every trip made on the Ruskin line involved one or more derailments, and we are rapidly reaching a point of cessation of service unless a general rehabilitation program is established." June 4, 1971, Mr. Lane wrote "the physical condition of the line is probably the worst on the system." He further acknowledged that there was no alternative but abandonment or rehabilitation of the line. However, Mr. Dixon, President of the Rock Island, determined prior to June 29, 1971, that abandonment should not be pursued, nor rehabilitation begun, but rather suggested spending "the minimum amount necessary to make the branch passable and keeping it in a minimal safe operating condition."

This apparently was a continuation of the Rock Island policy of many years. Mr. Lane wrote in February, 1973, that "one of the principal reasons it has shown a profit is the fact that we have, for years, performed an absolute minimum of maintenance on the line." (emphasis supplied). However, taking Mr. Dixon's suggestion to heart, the Rock Island managed to further reduce maintenance expenditures on the Ruskin line from $84,828 in 1971 to $48,289 in 1972. And the testimony at the hearing revealed that at least 50% of the maintenance expenditures on the Ruskin line went not to improve the "deplorable condition" of the line but to fix the numerous derailments. With this factual background in mind we turn now to the legal issues presented for our review.

Although the District Court felt an unlawful abandonment had occurred, it determined that the suit should be dismissed so that the ICC could exercise primary jurisdiction in the

matter. We think this determination was a clear error of law. The doctrine of primary jurisdiction has no application in this proceeding.

The challenge instituted is expressly authorized by the Interstate Commerce Act without mention of any prior resort to ICC administrative proceedings. The fact that suit may be maintained at the instance of the Commission is a strong indication that such matters are properly determined by the courts. Indeed, the Supreme Court has stated in regard to suits under §1(20):

> Upon presentation by the carrier of application for a certificate, the commission, for the purpose of determining whether it is authorized by the act to consider the merits, may pass incidentally upon the question whether the project is one covered by §1(18). But the decision of that question is for the court in either a suit to set aside an order granting a certificate or in a suit under §1(20) to enjoin a violation of §1(18). * * * That paragraph [§1(20)] provides the only method for enforcing §1(18).

Powell v. United States, 300 U.S. 276, 287 (1937)(emphasis supplied).

Secondly, absent the express provision of the statute requiring the district court to exercise its jurisdiction, the rationale of primary jurisdiction has no application to the facts of this case.[3] We have had occasion to recently consider the doctrine of primary jurisdiction. See Izaak Walton League

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[3] According to Professor Davis, the doctrine of primary jurisdiction received its first formulation in Texas & Pacific R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). 3 K. Davis, Administrative Law Treatise §19.02 (1958). There it was held the reasonableness of rates must first be determined by the Interstate Commerce Commission. The courts are not strangers to the doctrine of primary jurisdiction as it affects

v. St. Clair, No. 73-1407 (8th Cir., filed May 17, 1974). Therein we stated, quoting from United States v. Western Pac. R.R., 352 U.S. 59, 63-64 (1956):

> "'Primary jurisdiction,' * * * applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

Here, there are no issues requiring the views of the administrative agency. The concerns expressed by the District Court to justify application of the doctrine of primary jurisdiction relate to merits of the pending abandonment application. An action under §1(20) to enjoin abandonment concerns the maintenance of the procedural integrity of the processes provided in the Interstate Commerce Act and is not an action in

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railway cases. See cases collected in Great Northern Ry. v. Merchants Elev. Co., 259 U.S. 285, 295 n. 1 (1922). Mr. Justice Brandeis formulated the doctrine's application to ICC cases as follows:

> Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the nature of the controverted question and the nature of the inquiry necessary for its solution.

Great Northern Ry. v. Merchants Elev. Co., supra at 291 (emphasis supplied).

where the court may concern itself with the merits of the railroad's abandonment application.[4] The only question for resolution is whether there has been an abandonment within the intendment of §1(18). This is a legal question for the courts to determine. Wheeling & L.E. Ry. v. Pittsburg & W.V. Ry., supra at 393. See also, Meyers v. Jay Street Connecting R.R., supra; Pennsylvania v. Penn Central Transportation Co., 348 F.Supp. 28 (M.D.Pa. 1972), aff'd, 475 F.2d 1394 (3d Cir. 1973); Asbury v. Chesapeake & O. Ry., 264 F.Supp. 437 (D.D.C. 1967); Myers v. Arkansas & O. Ry., supra, wherein the courts proceeded to determine the abandonment issue without resort to the Commission.

Here, without denoting it as a finding, the District Court stated, "I am inclined to the view that there has been an unlawful abandonment." We emphasize that the question before the District Court does not concern the merits of the abandonment application--this is a matter for the ICC--but merely the narrow issue of whether an abandonment has occurred. Once this question is resolved with a finding of abandonment, the District Court then must proceed to determine whether an injunction should issue. The record before us admits of no finding but that an illegal abandonment has occurred; whether it be May or June, 1973,[5] is immaterial for the purposes of this case.

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[4]This is not to say that those factors which enter into a decision on the merits of an abandonment application may not be considered by the district court in deciding whether an injunction should issue.

[5]The Rock Island admitted to a "technical" abandonment of the line in June, 1973, when it says conditions would have permitted restoration of the line to service. The District Court viewed abandonment as occurring in May or June, 1973.

We therefore must reverse the decision of the District Court dismissing the complaint on grounds of primary jurisdiction.

We will not on this appeal direct entry of an injunction compelling the Rock Island to restore service. This is a matter which should first be determined by the District Court, taking into consideration the factual circumstances of the case and the strong Congressional policy and substantial public interest in not permitting abandonment of railroad service without approval of the ICC as required by §1(18) of the Interstate Commerce Act. As the complaint was dismissed due to application of the primary jurisdiction doctrine, the court made no more findings of fact than absolutely necessary so as not to interfere in any manner with the ICC proceedings. We think the District Court should have the opportunity to make factual findings and determine in the first instance whether an injunction should issue.

Section 1(20) states that an illegal abandonment "may be enjoined by any court of competent jurisdiction." (our emphasis This language implies the existence of discretion in determining whether an illegal abandonment should be enjoined. Ordinarily a reviewing court applies the principle that the grant or denial of an injunction will be reviewed only to determine whether there has been an abuse of discretion. Yakus v. United States, 321 U.S. 414, 440 (1944); Minnesota Public Interest Research Group v. Butz, No. 73-1242 (8th Cir., filed June 10, 1974) (en banc); E.W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108, 1113 (8th Cir. 1969); 7 Moore's Federal Practice ¶65.04[2] (2d ed. 1974). The same standard would appear applicable in the present case. We note the Supreme Court decisions in Thompson v. Texas Mexican Ry., 328 U.S. 134 (1946) and Texas & P. Ry. v. Gulf, C. & S.F. Ry., 270 U.S. 266 (1926) contain

language which arguably denies discretion to withhold an injunction once a violation of §1(18) is found.

In Thompson, a trackage agreement which allowed one railroad to operate over the tracks of another expired. The Supreme Court held that operations over the track must continue until abandonment is authorized, even though there was no longer a contract right to do so. In Texas & P. Ry. the railroad attempted an extension of its tracks without authorization from the ICC, also a violation of §1(18). In discussing a court's role upon application for injunction under §1(20) the Court stated:

> The function of the Court upon the application for an injunction is to construe the statutory provision and apply the provision as construed to the facts. The prohibition of paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction.

Texas & P. Ry. v. Gulf, C. & S.F. Ry., supra at 273.

In neither of these cases was the question of a physical impossibility of operation presented. In cases where a court has been confronted with a physical impossibility of operation without substantial expenditures for repair, the determination as to whether to issue an injunction has been viewed as one of equity, whether it would be equitable to require substantial expenditures when shortly thereafter the Commission may approve the railroad's abandonment application.

Thus, in Pennsylvania v. Penn Central Transportation Co., supra, an injunction was denied which would have required restoration of service on two branch lines badly damaged by Tropical Storm Agnes at a cost found by the District Court to be approximately $650,000. In Asbury v. Chesapeake & O. Ry.,

supra, an injunction was denied where the abandonment proceeding before the Commission was in its last stages, and restoration of service would have entailed repair of a tunnel at substantial cost. There is nothing in the reported decision indicating what necessitated the tunnel repair in Asbury. And in Myers v. Arkansas & O. Ry., supra, the court held there was no abandonment as the cessation of service was involuntary, being caused by severe rains and flooding which damaged the tracks and certain bridges lying within an area of property the United States had condemned and where the railway had no right to enter and make repairs.

The Commission argues that the above cases indicate only that the termination of service for reasons beyond the railroad's control[6] may justify the exercise of discretion in refusing an injunction, but that no case has allowed "abandonment by neglect," i.e., permitting a railway by a deliberate neglect of essential maintenance which allows tracks to deteriorate to a "deplorable condition" to then successfully argue that restoration of service would be inequitably expensive. In such a case it is argued that the equities of the situation significantly favor the shippers on the line and require the issuance of an injunction. We would agree that this practice, if found by the District Court, would be a factor militating against the Rock Island's argument of conditions beyond its control necessitating termination of service.

The Commission further argues that the weak financial basis of the railroad does not afford a sufficient basis for

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[6]Noting that in Asbury there was no indication of the reason for the necessity of tunnel repair.

denial of an injunction, citing Meyers v. Jay Street Connecting R.R., supra. In Meyers a preliminary injunction requiring the continuance of service was affirmed despite the fact the railroad had lost money for five years, had current liquid assets of only approximately $400, and in view of the undisputed fact of increasing larger monthly losses. The court noted that relief for the railroad lay in an application for reorganization under the Bankruptcy Act and stated:

> Unless they do so, and relief is denied to them, it is our opinion that the hardships imposed by the injunction do not outweigh the strong purpose of the Interstate Commerce Act to prohibit the abandonment of railway service without the approval of the ICC.

Meyers v. Jay Street Connecting R.R., supra at 536.

Obviously the Rock Island must present a compelling financial case in light of the persistent profit shown by the Ruskin line, the railroad's own projections of increasing grain production in the area which would increase car traffic, and the statutory prohibition against unauthorized abandonment.

There is one related aspect of this case we find particularly disturbing. Service on this line was terminated March 2, 1973. An abandonment application was filed May 21, 1973. At oral argument we were informed the matter had not yet been docketed for a hearing and no estimate of when a final Commission decision will be rendered is available. One of the factors affecting the balancing of equities in Penn Central Transportation Co., Asbury, and Myers, was the fact that the abandonment proceedings before the Commission were expected to be resolved within a reasonable period of time, and thus while cessation of service was no doubt a burden on shippers during the interim, abandonment would either soon be authorized

or denied. Where a Commission decision might soon be forthcoming authorizing abandonment, courts were justifiably reluctant to compel expenditures which in a few months could be seen to be wasteful or senseless. Here neither shippers nor this court can see any prospect of resolution of the abandonment issue within the near future.

The effects of this inordinate delay are felt most directly by shippers who no longer can move their goods by rail, for most shippers the cheapest method of transportation. The increased cost of transportation will of course increase the cost of the goods and thereby indirectly affect consumers. Moreover, businesses left without rail transportation may be forced to close or relocate, directly affecting the economies of the cities and towns along the abandoned line.

The effect on the railroad may not be entirely beneficial either. In the short run they are spared the expense of maintaining the line. But until abandonment is authorized they are liable for damages resulting from breach of their duty to provide transportation, 49 U.S.C. §1(4); Johnson v. Chicago, M. & St. P. R.R., 400 F.2d 968, 971-72 (9th Cir. 1968), and should abandonment not be authorized, the cost of restoration a few years hence may safely, though regretably, be assumed to be substantially higher than at present.

Finally, no doubt shippers and citizens of towns to be affected upon approval of an abandonment application receive the impression of a dereliction of duty on the part of the ICC when final resolution may be years in the future. It is frustrating and thoroughly regretable that the ICC could not in a matter of weeks determine whether or not this branch line should be abandoned, saving litigation expenses and more

...ntly giving a de... tive ...wer to the future of r... But no, our legal system is now so complex, so overburd...ed with contradictory requirements, that the system has almost ground to a halt.

The reason underlying this unreasonable delay is Congressional pyramiding of additional requirements on a system already enmeshed in bureaucratic delay. This disturbing situation is exacerbated by the application of the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, et seq., to railroad abandonment applications. See Harlem Valley Transportation Ass'n v. Stafford, 360 F.Supp. 1057 (S.D.N.Y. 1973), aff'd No. 73-2496 (2d Cir., filed June 18, 1974); City of New York v. United States, 337 F.Supp. 150, 158-60 (E.D.N.Y. 1972).

The decision of the district court in Harlem Valley requires the ICC to determine whether a particular abandonment is a "major Federal action significantly affecting the qualify of the human environment" and if so, to prepare an impact statement for circulation to parties and use in the agency process. We were informed on oral argument that the ICC is presently attempting to assemble a staff, and based on the appellate decision in Harlem Valley (now decided against the ICC), would shortly begin work on the accumulated abandonment petitions, some 320 as of January, 1974. How long this process may take before this particular application reaches the hearing stage is unknown, but we can rest assured it will be considerable.

Such a delay in the determination of an abandonment application significantly affects the traditional balancing of equities upon application for injunction. The efficacy of the procedural process is called into question any time a railroad abandons a line without ICC approval in light of

th[illegible]r statutory direction that service be maintained. How[illegible], as the district courts in Penn Central Transportation Co., Asbury, and Arkansas & O. Ry., determined, there are situations in which it would be inequitable to require restoration of service on a line where, caused through no fault of the railroad, the costs of restoration would be substantial, and the ICC could be expected to shortly determine whether abandonment would be authorized. We do not intend to intimate a feeling on the merits of an injunction in this particular case but merely are attempting to demonstrate the effects that the delay in agency processes caused by application of NEPA may have upon the discharge of that agency's statutory responsibilities in its field of expertise.[7] This is a matter which the courts, bound to apply the statutory mandates of both NEPA and the Interstate Commerce Act, cannot satisfactorily resolve. In view of the importance of rail transportation to the overall transportation needs of this country, we can only express a hope that Congress will recognize the difficulties created and attempt a satisfactory resolution.

Our reversal of the District Court's application of primary jurisdiction in this case compels a remand to the District Court to determine whether the injunction sought by the ICC should issue. We feel the District Court should have the initial opportunity to resolve the contested issues of fact in this record.

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[7]Not an inconsequential part of the delay in the ICC processes lies not so much in the application of NEPA to abandonment applications but in the ICC's refusal to recognize that the NEPA requirements do apply. See Harlem Valley Transportation Ass'n v. Stafford, No. 73-2496 (2d Cir., filed June 18, 1974)(slip opinion at 4278-81).

The judgment of the District Court dismissing the complaint is reversed and the cause remanded for further proceedings consistent with this opinion. We further express the hope that the ICC will undertake to give this abandonment proceeding speedy consideration consistent with the fulfillment of its statutory responsibilities.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.